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# Confessions--Right to Counsel Before Trial: The Indigent Defendant

ROY MORELAND\*

The law on confessions, while the accused is in custody after arrest but before trial, has had a two part development. The first part developed out of the practice of confining accused persons for several days before the examining trial,<sup>1</sup> during which time confessions were often obtained through coercion. While the law accepts voluntary confessions,<sup>2</sup> coerced confessions are in violation of the fifth amendment to the federal constitution and similar state constitutional provisions which prohibit self-incrimination. Having attacked the long delay before the examining trial in a number of federal court cases, the Supreme Court developed in the two leading cases of *McNabb v. United States*<sup>3</sup> and *Mallory v. United States*<sup>4</sup> the federal rule<sup>5</sup> that, if the ex-

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<sup>1</sup> Generally such long delays before the examining trial occurred while the accused was incarcerated, though occasionally the police did not even book the defendant or lodge him in a cell. They took him instead to a hotel or some other place where they could operate in private. The following is a some-what extreme illustration: A filling station on West Third Street in Lexington, Kentucky, was robbed at night and the operator killed. The local police questioned the last dozen customers, but they turned up nothing. Then three days later one of these customers called the police saying he had been kidnapped, presumably by the killers, and taken to Tennessee. The Lexington police brought him back, but took him to Louisville, where they held him for three days in a hotel room, tore up his story, and got a confession. He received a long prison sentence. So many facts were brought out against him at the trial as to indicate that he was guilty, but the story indicates the problem which the *McNabb-Mallory* rule (discussed *infra* in the text) attempts to solve.

<sup>2</sup> See *Curtis v. Commonwealth*, 226 S.W.2d 753, 754 (1949) and cases cited therein.

<sup>3</sup> 318 U.S. 332 (1943).

<sup>4</sup> 354 U.S. 449 (1957).

<sup>5</sup> The *McNabb-Mallory* rule is not binding on state courts but they are, of course, free to adopt the rule on their own. No state, however, has done so. Michigan appeared to do so in *People v. Hamilton*, 359 Mich. 410, 102 N.W.2d

(Continued on next page)

amining trial were too long delayed, a confession during that period was presumptively coerced. Although this rule was helpful, its effectiveness was limited by the amount of coercion the police could effect in a short period of time, as pointed out in a *Kentucky Law Journal student note*<sup>6</sup> cited in a dissenting opinion in *Crooker v. California*.<sup>7</sup>

The *McNabb-Mallory* rule's failure to stop coercion occasioned the second development in the law on confessions—the requirement of the presence of counsel at all questioning while the accused is in custody. As developed, this right was first enforced on interrogation between the time of arrest and the preliminary examination. Apparently, it is now applicable through the time of trial.<sup>8</sup>

To understand and appreciate the development of the requirement that an attorney must be present at confessions while the accused is in custody, one must realize the prevalence of the coerced confession in its various forms and intensities prior to the rule. No attempt will be made to parade a series of illustrations of the practice here. The books are full of examples.<sup>9</sup> Nor will an attempt be made to restate a history of the practice;<sup>10</sup> it is well known as one of the sorriest practices in American criminal procedure. One illustration will be given in an attempt to point up the falsity of the oft-repeated statement that the practice was not as common or as severe as rumored. On repeated occasions the writer has heard a public address by John Y. Brown, a defense attorney whose name is well-known all

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(Footnote continued from preceding page)

738 (1960) but that case has subsequently been severely criticized. W. LOCKHART, Y. KAMISAR, and J. CHOPER, *CONSTITUTIONAL CRIMINAL PROCEDURE, CASES AND MATERIALS*, Note 136 (1964). However, were it not for the recent Supreme Court broadening of the self-incrimination concept and crack-down on the right to counsel before trial in confession cases, it is believed that the Supreme Court would have extended the rule under an application of the fourteenth amendment. But, while the wide extension of the right to counsel before trial has cured a great part of the evil of coerced confessions, the *McNabb-Mallory* rule is sound and still needed, and should be extended to state courts.

<sup>6</sup> See Note, *Criminal Procedure—Right to Counsel Prior to Trial*, 44 Ky. L. J. 103 (1955).

<sup>7</sup> 357 U.S. 433, 445 (1958).

<sup>8</sup> At least in the case of felonies, it has long been the rule that the accused is entitled to counsel on the trial and appeal.

<sup>9</sup> See, for example, Note, *The Third Degree*, 43 HARV. L. REV. 617 (1930); Lunt, *The American Inquisition*, SCRIBNER'S MAGAZINE, Jan. 1931, at 57.

<sup>10</sup> See the short discussion, Note, *The Third Degree—Its Historical Background The Present Law and Recommendations*, 43 Ky. L. J. 392 (1954).

over Kentucky, in which he recounted his experiences in his first criminal case. His task was proving his Negro client's story that the full confession the prosecution possessed had been beaten out of him. The young lawyer happened to tell his problem to a young newspaper man, who has since become a national figure. The young reporter flush with friendship—and several drinks—told the attorney that he had witnessed the beating which resulted in the confession. According to the reporter, the defendant had been brought into a room with a policeman holding each arm. A third policeman asked the Negro for a confession. When the man remained mute, the policeman hit him with his fist. This brutal interrogation continued until the accused was upon his knees and had consented to sign a confession. Also present in the room, was a fourth policeman, a sergeant who later obtained high position in police circles and in state political circles, a man of high reputation for integrity who would not be expected to countenance such proceedings. On the following day the reporter refused to testify to the beating when the case came to trial because this would be a violation of confidence—and, besides, he would then be at odds with the police and unable to get another story from them. A reporter from an out-of-town newspaper who saw the beating *did* testify at the trial and his newspaper fired him the next day. The first reporter was subpoenaed to corroborate this testimony, but when asked at the trial whether he had seen the alleged beating he simply replied, "I was looking out of the window at the time." Like Pilate who washed his hands! The reporter had kept faith, but the jury had heard enough. It gave the Negro life, instead of death, and the case was not appealed.

This historiette is recited to illustrate that the coerced confession was not limited to Chicago and other large cities<sup>11</sup> (it happened *here*). As stated by Warner:

"Everywhere the formula for successful detective work (was) that laid down by former Captain Fiaschetti of the New York City police: 'You get a bit of information, and then you grab

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<sup>11</sup> NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 153 (No. 11, 1931), concluded "[T]he third degree—the inflicting of pain, physical or mental, to extract confessions or statements is widespread throughout the country."

the suspect and break him down. That is how detective work is done—a general formula.’”<sup>12</sup>

The Supreme Court had discussed the coerced confession on numerous occasions prior to the new rules, but had been unable to thwart the evil. The question naturally arises why the Court did not make a direct attack upon the problem by adopting the rule that “a *confession* while the accused is in custody is *inadmissible* as evidence unless made in the presence of an attorney.” Such a rule could have been supported by the due process clauses of the fifth and fourteenth amendments. It is suggested, however, that such a rule would have been attacked as an extreme interpretation of due process since, arguably, there may be due process in many cases without the presence of an attorney. It would be urged that on occasion confessions are voluntarily made, without physical or mental coercion (the police always deny the use of unlawful tactics). However the coerced confession is constitutionally prohibited not *by name* but only by an interpretation of due process clauses, and such an interpretation would result in reading coercion out of the case in too many situations.<sup>13</sup> But the right to the assistance of counsel is *specifically enunciated* both in the sixth amendment to the federal constitution and in state constitutions. While basing the requirement of the presence of an attorney upon such a constitutional provision does not completely cover the problem (for example, is an attorney necessarily required in misdemeanor cases), it does place the rule more directly within the constitutions than does an extension of the prohibition against coerced confessions. It is believed that such reasoning underlies the basing of the approach to the problem of coercion upon the constitutional right to counsel.

An alternative approach to the evil of the coerced confession, a construction of the constitutional prohibition against self-incrimination, may be dismissed upon recalling that the Supreme Court relied upon that provision for one hundred and fifty years without stopping the coerced confession.

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<sup>12</sup> Warner, *How Can The Third Degree be Eliminated*, 1 BILL OF RIGHTS REV. 24, 25 (1942).

<sup>13</sup> This is the reasoning of my colleague, Professor Eugene Mooney, College of Law, University of Kentucky, with which I agree.

Admitting, then, the prevalence of the coerced confession and the necessity of taking a new approach to a solution of the problem, an examination will be made of the leading cases enunciating the new federal rule that an attorney must be present during custodial interrogation of an accused person and of problems involved in implementing the rule. The presence of an attorney has long been required at the *trial*, particularly in felony cases. The importance of the *McNabb-Mallory* extension of this rule is that while an accused may plead guilty during a trial, it is *prior* to the trial that confessions, as such, are obtained.

The development of the right to counsel by which it was extended to pretrial facts of criminal procedure was forecast by *Messiah v. United States*,<sup>14</sup> and *Gideon v. Wainwright*.<sup>15</sup> In *Messiah*, the accused was *not* in custody, but was out on bail after indictment, and had made incriminating statements to a co-defendant in an automobile which were relayed to the police through a radio transmitter. The Supreme Court's opinion that these statements were inadmissible in a federal proceeding because of the deprivation of counsel in contravention of the sixth amendment was a somewhat questionable holding since the statements, although induced by trickery,<sup>16</sup> were voluntarily made. In *Gideon*, the Court held the sixth amendment provision of right to counsel to be applicable to a *state trial* in a non-capital case.

The case which initiated the development that a defendant in custody cannot be questioned except in the presence of an attorney was *Escobedo v. Illinois*.<sup>17</sup> In that case, a defendant

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<sup>14</sup> 377 U.S. 201 (1964).

<sup>15</sup> 372 U.S. 335 (1963). See also the concurring opinions by Justices Douglas and Stewart in *Spano v. New York*, 360 U.S. 315 (1959). The fifth amendment provision prohibiting self-incrimination has also been extended to the states through the fourteenth amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>16</sup> See *On Lee v. U.S.*, 343 U.S. 747 (1952). In that case, while defendant was at large on bail, an old acquaintance, and former employee, who was an undercover agent for the government, talked to him at his place of business and tricked him into making incriminating statements which were picked up from a radio transmitter on the person of the agent. The Supreme Court held this was not ground for a reversal of conviction. The decision was five to four. As in *Messiah* the defendant was not in custody, so there was no coercion. Should the law protect against trickery as well as coercion? It is arguable that it should, but the criminal law has not reached that level yet, even in the case of the wiretap, at least where there is no trespass, although a technical violation of the right of privacy.

<sup>17</sup> 378 U.S. 478 (1964).

being held on a felony charge made several attempts to see his lawyer who, despite his presence and persistence, was refused access to his client. Escobedo was not advised by the police of his right to remain silent and, after persistent questioning, made a damaging statement to an Assistant State's Attorney which was admitted into evidence at the trial. His conviction for murder was affirmed by the State Supreme Court. However, the United States Supreme Court reversed the conviction enunciating the ambiguous rule that "where a police investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect in police custody" his constitutional rights come into play. Particularly, said the court, Escobedo had been denied an opportunity to consult with his counsel and had not been warned of his right to remain silent. The five to four decision was limited to these two questions, leaving unanswered a number of problems connected with custodial interrogation, such as whether the right to counsel at that procedural stage applies to indigent defendants. The more definite and inclusive statement of the emerging rule which was therefore required was attempted by the court two years later in *Miranda v. Arizona*.<sup>18</sup> In that case the court held that a suspect in custody "or otherwise significantly deprived of his freedom"<sup>19</sup> must be advised prior to any questioning, unless other effective means are adopted, that (1) he has a right to remain silent; (2) any statement he makes may be used as evidence against him; and (3) he has the right to an attorney, either retained or appointed. He may waive these constitutional rights only by a waiver made "voluntarily, knowingly and intelligently."

An attorney will almost certainly advise a suspect to remain silent. So, confessions and statements will be cut down about 75 per cent. But the impact of that result is greatly diminished

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<sup>18</sup> 384 U.S. 436 (1966). Although the decision is usually referred to as *Miranda v. Arizona*, the case was actually a consolidation of the appeals of four separate defendants. Each case involved a confession that was introduced at the trial over the defendant's objections.

<sup>19</sup> This, the court stated in a footnote, is what was meant in *Escobedo* by the phrase, "when the investigation has focused on the accused." Thus, an ambiguous phrase in *Miranda* is substituted for the equally nebulous one in *Escobedo*. *Id.* at 444, n. 4.

by the fact that at the trial in about two-thirds of these cases, counsel will advise a guilty plea to a lesser charge. Otherwise, all these cases would never get tried.

#### A. RIGHT TO APPOINTED COUNSEL IN MISDEMEANOR CASES.

Whether the right to appoint counsel applies in misdemeanor cases is unclear. The Supreme Court has never ruled on the question. It is true that certain members of the court have uttered language which may be interpreted as supporting the proposition. Justice Black made no indication that the right to counsel would be limited to felony cases when he said in *Gideon*:

The right of *one charged with crime* to counsel may not be deemed fundamental and essential to fair trial in some countries, but it is in ours.<sup>20</sup>

Justice Harlan in a concurring opinion said:

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in non-capital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should be extended to *all* criminal cases need not now be decided.)<sup>21</sup>

Of particular interest is *Patterson v. Warden*,<sup>22</sup> per curiam decision during the same term as *Gideon*, in which the court vacated an indigent misdemeanant's conviction and remanded the case "*for further consideration in light of Gideon v. Wainwright.*"<sup>23</sup>

It is important to distinguish the right to appointed counsel in indigent misdemeanor cases in the federal and state courts.

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<sup>20</sup> 372 U.S. at 344 (1963).

<sup>21</sup> *Id.* at 351.

<sup>22</sup> 372 U.S. 776 (1963).

<sup>23</sup> *Id.* at 776. Patterson was subsequently granted a new trial. *Patterson v. State*, 231 Md. 509, 191 A.2d 746 (1963). Other Supreme Court decisions have stated by way of dictum that a right to counsel exists "under proper circumstances," not limiting the statement to felonies. But the statements occur in *felony* cases. See *Foster v. Illinois*, 332 U.S. 134, 136 (1947); *Bute v. Illinois*, 333 U.S. 640, 666 (1948).



Although the Supreme Court has not decided as to the right of an indigent misdemeanant to court-appointed counsel, a lower federal court in a federal prosecution in the District of Columbia held in a *petty misdemeanor* case that an indigent misdemeanant was entitled to appointed counsel *on arraignment*.<sup>24</sup> Furthermore, there is specific federal legislation upon the question. The Federal Criminal Justice Act of 1964 provides a plan for furnishing federally compensated counsel for indigent misdemeanants in all but petty cases, the latter being defined as "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500 or both."<sup>25</sup> However, federal court officials have stated unofficially that, while there are very few petty misdemeanor prosecutions in federal courts, it is their opinion that an indigent petty misdemeanant would be furnished an unpaid, court-appointed lawyer.

Recently, a number of federal courts have held on habeas corpus that an indigent misdemeanant has the right to appointed counsel in a *state* prosecution. With reasoning based largely on both the broad language in *Gideon* and the Supreme Court's treatment of the *Patterson* case, such cases repeatedly say that the fact that the offense is a "petty" misdemeanor makes no difference. In *Harvey v. State of Mississippi*<sup>26</sup> the defendant was convicted of "possession of liquor," a misdemeanor punishable by a fine of up to \$500 and up to 90 days in jail. The conviction was affirmed on appeal and he brought habeas corpus in a federal court contending that he had been denied counsel. The court reversed the conviction quoting *Evans v. Rives*,<sup>27</sup> as follows:

It is suggested . . . that the constitutional guaranty of the right of counsel in a criminal case does not apply except in the case of 'serious offenses'. . . [A]s far as the right to the assistance of counsel is concerned, the constitution draws no distinction

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<sup>24</sup> *Evans v. Rives*, 126 F.2d 633 (D.C. Cir. 1942).

<sup>25</sup> 18 U.S.C. § 1 (1964). Criminal Justice Act of 1964, 18 U.S.C. § 3006A(b) (1964). Such representation is compensated at a rate not exceeding ten dollars an hour for time reasonably expended out of court and fifteen dollars an hour for time in court or before an United States Commissioner.

<sup>26</sup> 240 F.2d 263 (5th Cir. 1965).

<sup>27</sup> 126 F.2d 633 (D.C. Cir. 1942).

between loss of liberty for a short period and such loss for a long one.<sup>28</sup>

In *McDonald v. Moore*,<sup>29</sup> the court refused to make a distinction as to petty misdemeanors and said: "We are without any authority authorizing the announcement of a petty offense rule."<sup>30</sup>

To say that there is no constitutional distinction that can be based upon the duration of the imprisonment is to make an impractical and unnecessary interpretation of the sixth amendment. It is true that the sixth amendment states that in "all" criminal prosecutions the accused shall have the right to counsel, but this was long interpreted as excluding *all* misdemeanors from the exercise of the right and on various occasions as distinguishing between petty misdemeanors and those of a higher order. Constitutions should not necessarily be construed *literally*. Interpretation should always stay within the spirit and purpose of the instrument, but history, the practicalities of the particular situation, and changing social mores should also be taken into consideration. It is unthoughtful, to say the least, to argue that a short imprisonment in the county jail is as opprobrious as a long one in the penitentiary. Far greater odium attaches to a penitentiary sentence, and naturally a short sentence is a lesser burden than a long one.

The practicalities of the case are probably the determining factor. There are literally hundreds of these petty misdemeanor cases which would require free counsel if minor offenses were to be included in the rule. Traffic cases alone are almost uncountable. As was said in *Brinson v. Florida*:<sup>31</sup>

If *Gideon* is extended to all misdemeanors, its effect would be profound and create a tremendous economic and administrative burden since only a small minority of states now require appointment of counsel for indigents in misdemeanor cases. The demands upon the bench and bar would be staggering and well-nigh impossible. Such a construction

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<sup>28</sup> 240 F.2d at 271.

<sup>29</sup> 353 F.2d 106 (5th Cir. 1965).

<sup>30</sup> *Id.* at 110. See also *Rutledge v. City of Miami*, 267 F. Supp. 885 (S.D. Fla. 1967); *Arbo v. Hegstrom* 261 F. Supp. 397 (D. Conn. 1966); *Petition of Thomas*, 261 F. Supp. 263 (W.D. La. 1966).

<sup>31</sup> 273 F. Supp. 840 (S.D. Fla. 1967).

could lead to the appointment of counsel for misdemeanors not normally considered criminal, such as overparking and other petty traffic offenses, jaywalking, dropping trash upon the sidewalk, and like offenses.<sup>32</sup>

While most decisions extending the right to appointed counsel in indigent misdemeanor cases in state prosecutions have been by habeas corpus to the federal courts, some state appellate courts have extended the right in such cases. In an appeal from a municipal court prosecution in *In Re Johnson*,<sup>33</sup> the California appellate court cited *Gideon* and a rather broad state constitutional provision in holding that one accused of driving with a revoked license was entitled to counsel. In *People v. Witek*,<sup>34</sup> the New York appellate court held that three youths accused of stealing a half bushel of apples "of the value of \$2" were entitled to counsel in proceedings before the justice of the peace. The decision was four to three, with the majority opinion insisting on the ease of securing court-appointed counsel, and the minority opinion more forcefully, and more accurately, pointing out the difficulty of securing attorneys to defend indigent petty misdemeanants in justice of the peace courts.

While some state appellate courts have extended the right to appointed counsel in indigent misdemeanor cases, and while some federal courts have recognized the right in state prosecutions on habeas corpus, a number of state courts have refused to recognize the right and the decisions did not go to the federal courts on habeas corpus. In *Fish v. State*,<sup>35</sup> the Florida appellate court held that an indigent accused of committing a misdemeanor was not entitled to appointed counsel. The fact that the Florida legislature had provided for a public defender in all indigent felony cases influenced the decision. The Supreme Court of Louisiana held in *State v. Thomas*<sup>36</sup> that *Gideon* is inapplicable to misdemeanors. In *State v. Zucconi*,<sup>37</sup> a New Jersey traffic case, the appellate court held that the *Miranda* requirement of counsel

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<sup>32</sup> *Id.* at 845. The court nevertheless felt bound by *Harvey* and *McDonald*, federal fifth circuit decisions, and ordered the release of the defendant as having been denied counsel.

<sup>33</sup> 42 Cal. 228, 398 P.2d 420 (1965).

<sup>34</sup> 15 N.Y.2d 392, 207 N.E.2d 358 (1965).

<sup>35</sup> 159 So.2d 866 (Fla. 1964).

<sup>36</sup> 249 La. 742, 190 So.2d 909 (1966).

<sup>37</sup> 93 N.J. Super. 380, 226 A.2d 16 (App. Div. 1967).

did not apply in a state prosecution of an indigent misdemeanor. In *State v. Sherron*,<sup>38</sup> the North Carolina appellate court held that an indigent misdemeanor's right to appointed counsel is not absolute, but is dependent upon such circumstances as the gravity of the offense. In *Sherron*, the denial of free counsel was affirmed although the defendant was convicted of malicious injury to personal property. In a similar North Carolina case brought on habeas corpus, the Federal District Court for the Eastern District of North Carolina held in one of the best written analyses of the relevant cases that the gravity of the offense and other circumstances determine the right to appointed counsel in an indigent misdemeanor case.<sup>39</sup>

The general variance between state and federal holdings is well illustrated by *Winters v. Beck*.<sup>40</sup> The defendant was convicted of immorality, a misdemeanor by city ordinance, and his punishment was fixed at 30 days, with a fine of \$254 including costs. The appellate court affirmed the conviction, stating that indigents have always had court-appointed counsel in felony cases but that "thousands of misdemeanor cases are tried in the Municipal Courts of Pulaski County annually" and in many of these cases the defendants are not represented by counsel. The court refused to follow *Gideon* where "the court was dealing with a felony case." The United States Supreme Court denied certiorari,<sup>41</sup> but the defendant subsequently obtained a writ of habeas corpus from a federal court<sup>42</sup> which said that, while the charge was not in itself serious enough to require the appointment of counsel, the interaction of the "dollar-a-day" state statute with a \$254 fine to be satisfied by confinement, if unpaid, plus a thirty day jail sentence constituted an offense serious enough to require the appointment of counsel.<sup>43</sup>

The federal-state variance is further illustrated by *DeJoseph v. State*.<sup>44</sup> The defendant was charged with failure to support his wife and children, a misdemeanor punishable by a maximum

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<sup>38</sup> 268 N.C. 694, 151 S.E.2d 599 (1966).

<sup>39</sup> Creighton v. North Carolina, 257 F. Supp. 806 (E.D. N. C. 1966).

<sup>40</sup> 239 Ark. 1151, 397 S.W.2d 364 (1966).

<sup>41</sup> 385 U.S. 907 (1966).

<sup>42</sup> *Winters v. Beck*, 281 F. Supp. 793 (W.D. Ark. 1968).

<sup>43</sup> This kind of reasoning would throw most petty misdemeanors into the "serious offense" category, since indigent defendants presumably are unable to pay fines.

<sup>44</sup> 222 A.2d 752 (1966).

of not more than one year's confinement in jail, and was convicted without counsel. The Connecticut appellate court affirmed the conviction and certiorari was denied<sup>45</sup> despite the *result* in *Arbo v. Hegstrom*<sup>46</sup>—a factually similar Connecticut case in which a federal court released the defendant on habeas corpus.

A case which further complicates the indigent defense problem by adding a new facet and an approach by the Supreme Court somewhat contrary to its treatment of *Patterson* is *In Re Gault*. This case,<sup>47</sup> which is the basis of the new rule that a juvenile may be entitled to free counsel in a Juvenile Court proceeding, does not require that counsel must be offered in *all* cases. What the case held is that the due process clause of the fourteenth amendment requires that in juvenile proceedings to determine delinquency which may result in commitment to an institution, the child and his parents must be notified that he will be supplied counsel if unable to pay for such service. The court said that such a proceeding is comparable to a felony prosecution. This may be taken as an over-statement when the analogy is applied to some juvenile cases where the juvenile is entitled to free counsel; but the fact remains that the new rule, still somewhat undefined, permits the juvenile to have appointed counsel in "serious cases," according to juvenile court standards.<sup>48</sup>

According to Judge Gardner Turner, the Juvenile Court of Fayette County, Kentucky seems to be following this interpretation of *In Re Gault*. Juvenile court defenders defend all juveniles where a petition is filed under section 208.070 of the Kentucky Revised Statutes and there is a formal hearing, and perhaps in some other cases where the informal hearing indicates a "serious offense." In non-serious charges no attorney is furnished and the proceeding is informal.

The variance which produces the confession and contradiction surrounding such cases as *Winters*, *DeJoseph* and *Gault*

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<sup>45</sup> 385 U.S. 982 (1966).

<sup>46</sup> 261 F. Supp. 397 (D. Conn. 1966).

<sup>47</sup> 387 U.S. 1 (1967).

<sup>48</sup> "Recently, the Fayette County Fiscal Court appointed two public defenders to be assigned to Juvenile Court. These attorneys each are paid \$250.00 per month for their services and will defend indigent defendants in all cases in which a petition has been filed and a formal hearing held." Gardner Turner, Judge, Juvenile Court, Fayette County, Kentucky.

is occasioned by the fact that the Supreme Court<sup>49</sup> is probably in favor of meeting the issue, but the division of both the Court and public opinion on the matter has caused the Court to withhold any decision.<sup>50</sup> Meanwhile, the lower federal courts and the state appellate courts maintain generally conflicting views on the question, perhaps because the federal courts in such cases do not have to face the problem of implementation. If indigent defendants are furnished counsel for free, the program must be implemented either through the "voluntary" services of attorneys or through federal and/or state tax money. Federal tax money has been readily available for the past decade; new and additional state taxes are more difficult to obtain. Another possible explanation is that state appellate courts are somewhat disposed to think that if a convicted defendant did not have "justice" in the procedures below, it will show up on the record and a new trial can be ordered. Such thinking relies strongly on the ability of the trial judge to use his discretion and rectify matters if need be.<sup>51</sup>

#### B. IMPLEMENTATION OF RIGHT TO COUNSEL IN INDIGENT MISDEMEANOR CASES.

A decision that a defendant needs a lawyer immediately on arrest, and continuously thereafter, in *every* criminal case does not solve the problem of the indigent defendant. There remains the almost insurmountable problem of implementing such professional services. Lawyers must make a living just like other citizens and if an attorney works for free for an indigent, he must either charge his paying clients more than he otherwise would or suffer a loss in his income, unless he is compensated by the government or some foundation. It is as simple as that.

To say that lawyers owe a duty to defend the indigent

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<sup>49</sup> Justices Stewart, Black and Douglas. See *De Joseph v. Connecticut*, 385 U.S. 982 (1966) (dissenting from denial of certiorari).

<sup>50</sup> In an excellent Case Comment, 19 CASE WESTERN RES. L. REV. 367, 370 (1968), the writer makes much of this variance between the Supreme Court and some federal courts. The fact remains that opinions vary as to the right of an indigent misdemeanant to court-appointed counsel, and the Supreme Court, quite correctly perhaps, refuses to make a decision on the matter.

<sup>51</sup> See *Creighton v. North Carolina*, 257 F. Supp. 806 (E.D. N. Car. 1966), which discusses this reasoning as embodied in the North Carolina rule. The success of the rule seems doubtful in light of past experience.

gratuitously because they are members of the bar is a cliché. Actually, free service to the poor by lawyers is an historic survivor. Historically, doctors and lawyers come from the moneyed class; they had inherited substantial incomes and so were able, and felt it a duty, to render community service. But times have changed. Doctors and lawyers now come from *all* segments of society. In their practice, most of them have no income other than the moneys they receive as compensation from patients and clients. Consequently, doctors have gradually quit practically all free service. Try to get a doctor to render free services to an indigent member of the community! Today practically all such care is compensated for by the city, county, state, and federal governments.

Why have doctors been able to unburden themselves of this so-called professional obligation while lawyers have not? There are those who say that lawyers' charges are high so they are able to absorb this burden. But doctors charge more highly for their services than lawyers, as do plumbers and electricians. The question is, why have doctors been able to convince the public that it is not fair or right that they should render free services while lawyers, who are also skilled professionals with strict and lengthy education requirements, have not been able to do so? It is believed it is because judges have had the power and authority to enforce continuation of the historic practice. With no authoritative judges presiding over the medical profession, medical associations have gradually allowed the practice to be discontinued.

If the proposition that lawyers have no greater "duty" to render gratuitous services to the indigent than have doctors and others is accepted, the problem is still unsolved, for such services are needed. It would appear, then, that the only solution to the problem is to provide compensation for them out of taxes, state and federal, supplemented to some extent by "intern" services of law school students and occasional grants from foundations.

Furthermore, if it has become necessary to add compensation to lawyers for services to the poor to the tax burden, it becomes necessary to give serious consideration to the amount and extent of such services. Shall they extend to misdemeanors? There are literally hundreds of these before the courts every week.

An attorney is appointed to defend a misdemeanor. He sits for two hours before his case is called. His whole afternoon is wasted.

The Supreme Court not having decided the question, the draftsmen of statutory provisions for compensating such services must turn to Congressional and state legislative enactments for guidance. At the federal court level there is the Federal Criminal Justice Act of 1968 providing for the furnishing of paid counsel for all felony cases and in all but petty misdemeanors,<sup>52</sup> the latter being an offense the penalty for which does not exceed imprisonment for six months or a fine of \$500 or both.<sup>53</sup> The state statutes which furnish legal service to indigent defendants vary greatly.

A most conservative approach is the Florida public defender system composed of two related acts<sup>54</sup> which provide compensated counsel to adult defendants other than misdemeanants and to juvenile defendants who request such assistance and are granted it by the judge. These statutes are an apparent attempt to comply exactly with only the minimum requirements of the fourteenth amendment expressed in *Gideon* and *Gault*. However, it may well be doubted whether *Gault* is satisfied, since the act provides that counsel to the juvenile shall be supplied if he requests an attorney and the court on its own motion appoints one. *Miranda*,<sup>55</sup> which laid down the guideline for the appointment of counsel to indigents, specifically provides that the accused must be *affirmatively told* that he may have counsel if indigent. It should be pointed out, however, that the Florida act would exceed *Gault* in one facet, since the indigent's "request" may be for an attorney in a less "serious offense" than specified in *Gault*.

Kentucky statutes are also very conservative, but go slightly beyond the Florida acts to provide services to the indigent in certain high misdemeanors. The Kentucky Rules of Criminal Procedure provide:

If the crime of which the defendant is charged is punishable by a fine of more than \$500 or by confinement for more than

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<sup>52</sup> 18 U.S.C. § 3006 A(b) (1964).

<sup>53</sup> 18 U.S.C. § 1 (1964).

<sup>54</sup> FLA. STAT. ANN. §§ 909.21 and 27.51 (Supp. 1963).

<sup>55</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).



12 months, the examining court shall appoint counsel to represent him in the preliminary proceeding unless he elects to proceed without counsel or is able to obtain counsel.

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If on arraignment or thereafter, in felony cases, the defendant appears in court without counsel, the court shall advise him of his right to counsel, and shall assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel.<sup>56</sup>

There is apparent ambiguity when these two rules are read together. An indigent misdemeanor charged with an offense punishable by a fine of more than \$500 and for confinement for more than twelve months is entitled to appointed counsel at the preliminary proceedings who supposedly serves during the subsequent interval before arraignment and trial. But at that point the second rule would become operative and, since it applies only to felonies, the defendant would thereupon be without appointed counsel. It is, however, understood that despite the statutory contradiction, it is the practice that counsel appointed at the examining trial shall continue to serve at the arraignment and during the trial.<sup>57</sup> It should also be pointed out that the Kentucky act goes further than the Florida provisions in that some high misdemeanors are punishable by more than twelve months in jail and/or a \$500 fine and are therefore covered, whereas the Florida acts are limited to felony cases except in the case of juveniles.

Forty-four states have adopted public defender programs of various types.<sup>58</sup> Some have purely defender systems; others have only private counsel with compensation set by the court; others have combinations of the two.<sup>59</sup> Forty states have statutory

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<sup>56</sup> Ky. R. CRIM. P. 3.08(2); *id.* 8.04.

<sup>57</sup> For example, this is the practice in the Fayette Circuit Court, Fayette County, Kentucky.

<sup>58</sup> Note, *Attorney's Fees for Indigent Criminal Defendants*, 55 Ky. L.J. 707, 710 (1967).

<sup>59</sup> Justice Douglas in a dissenting opinion to *Hackin v. Arizona*, 389 U.S. 143, 145 (1967), maintains that the legal problems of the poor are too numerous to be handled by lawyers alone. His dissent, buttressed by copious footnotes takes the quasi-political position that social workers, members of health professions, and other non-lawyer aids need to assist in solving the legal problems of the poor, of which defense of the indigent in criminal cases is only a small part.

provisions for compensation of counsel in such cases.<sup>60</sup> Such facts indicate the amount of thought and action that have been centered on the problem. Those states in which there is no compensation for attorneys in indigent cases are: Kentucky, Louisiana, Missouri, South Carolina, Tennessee and Utah.<sup>61</sup> Note, especially, that Kentucky is one of these.

The thesis of this article has been that an accused person in a criminal case has the need of counsel at least from the moment of his arrest. However, this need is limited by practical exigencies. A balance must be struck between what might be thought to be an ideal situation and what it is socially possible to achieve. One who proposes indigent defender legislation must keep in mind the willingness and ability of taxpayers to pay for the suggested program and whether the legislature will adopt and implement it.

It is with such thoughts in mind that the following indigent defender statute is proposed for the consideration of the profession and the legislature. In scope and in administrative procedure it is based primarily on the Public Defender Acts of Florida and on the bill which failed passage by the 1968 Kentucky legislature. Some features of these Acts have been adapted to the proposed statute and some different ones have been suggested. An attempt has been made to make the public defender correspond to the commonwealth attorney and the juvenile court defender correspond to the county attorney in the methods of election and manner of compensation.

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#### AN ACT RELATING TO PUBLIC DEFENDERS.

#### BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY:

Section 1. A new section of the Kentucky Revised Statutes is created to read:

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<sup>60</sup> Grove, *Gideon's Trumpet: Taps For An Antiquated System?*, 54 Ky. L.J. 527, 544 (1966) listing state statutes. This exhaustive article, indicating much thought and research, is unfortunate in that its conclusion calls for a Defender Committee consisting of the judges of the Court of Appeals, the deans of the law schools of the Commonwealth, and a representative of the state bar association with the Chief Justice serving as Chairman. It would be the duty of this Committee to administer the details of the Act. It is submitted that such an administrative

(Continued on next page)

(1) There shall be a public defender elected at the same time and in the same manner as the commonwealth attorney for a term of four years for each circuit court district in which there is a city of the first or second class. The public defender shall be at least twenty-four years of age at the time of his election, a citizen of Kentucky, a resident of the state for two years and of the district for which he is elected for one year next preceding his election, and a licensed practicing attorney for three years.

(2) The public defender shall represent any person who is determined to be insolvent as provided by this act, who is under arrest for, or is charged with, a felony within the jurisdiction of the circuit court, and who, upon being advised he has a right to such public defender, requests it, or if the court on its own motion so orders and such person does not knowingly, understandingly, and intelligently waive the right to be so represented. The clerk of the court conducting such proceedings is directed to make such proceedings a matter of record.

(3) The public defender shall perform all duties necessary for the prosecution of an appeal to the Court of Appeals at the request of any person determined to be indigent as provided by section 4 of this act, or at the request of the Court of Appeals to prosecute an appeal or any post-conviction remedy in behalf of such person before that court, if the public defender is first satisfied that there is arguable merit to the proceeding.

Section 2. A new section of the Kentucky Revised Statutes is created to read:

(1) There shall be a juvenile court defender elected at the same time and in the same manner as the county attorney for a term of four years for each circuit court district in which there is a city of the first or second class. The juvenile court defender shall be at least 24 years of age at the time of his election, a citizen of Kentucky, a resident of the state for two years and of the district for which he is elected for one year next preceding his election, and a licensed practicing attorney for three years.

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(Footnote continued from preceding page)

procedure would be totally ineffective. All these individuals have heavy primary official duties and also serve in other public service and so could not add the administration of a Public Defender Act to their responsibilities.

<sup>61</sup> *Supra* note 60, at 544 n. 59.

(2) The juvenile court defender shall represent any juvenile who is determined to be insolvent as provided by this act, who is under arrest or is charged with a criminal offense within the jurisdiction of the juvenile court, and who upon being advised he has a right to such juvenile defender requests it, or if the court on its own motion so orders and such juvenile does not knowingly, understandingly, and intelligently waive the right to be so represented. The clerk of the court conducting such proceedings is directed to make such proceedings a matter of record.

Section 3. A new section of the Kentucky Revised Statutes is created to read:

(1) The salary of the public defender in a county containing three or more divisions of circuit court shall be (\$9500?) per year; in other counties it shall be (\$7200?) per year. In a county containing a city of the first class the public defender may have one assistant with the qualifications set out in subsection (1) of this act, who shall receive a salary of (\$6000?) per year.

(2) The salary of the juvenile court defender in a county containing three or more divisions of circuit court shall be (\$5000?) per year. In other counties it shall be (\$3500?) per year.

(3) A public defender and a juvenile court defender shall receive an expense allowance of \$100 per month to defray office expenses.

(4) Salaries and expenses authorized by this act shall be paid as are salaries and expenses of the commonwealth attorney and county attorney, respectively.

(5) The public defender and juvenile court defender shall give priority and preference to their duties under the provisions of this act and may engage in the private practice of law only to the extent that it will not interfere with or prevent performance of their duties under this act and shall not otherwise engage in the practice of criminal law.

Section 4. A new section of the Kentucky Revised Statutes is created to read:

The public defender or the juvenile court defender may, with the consent of the court, but without compensation by

the state or county, accept the voluntary services of members of the Kentucky bar in good standing in the defense of an insolvent person.

Section 5. A new section of the Kentucky Revised Statutes is created to read:

(1) The determination of insolvency of any person shall be made by the court and may be done at any stage of the proceedings. The public defender or the juvenile court defender shall be allowed process of the court to summon witnesses to testify before the court concerning the financial ability of any accused person to employ counsel in his own defense.

(2) If the court shall determine and adjudge within one year after the determination of insolvency, that the accused was erroneously or improperly determined to be insolvent, the commonwealth attorney or the county attorney may, in the name of the state, proceed against the accused for the reasonable value of the services rendered to the accused, including all costs paid by the state or county in his behalf. Any amount recovered shall be deposited in the general revenue or county general fund to the account from which the expenses of the office of public defender or juvenile court defender are paid.

Section 6. A new section of the Kentucky Revised Statutes is created to read:

There is hereby created a lien, enforceable as hereinafter provided, upon all the property both real and personal of any person who is receiving or has received any assistance from any public defender or juvenile court defender of the state or county. Such assistance shall constitute a claim against the applicant and his estate, enforceable according to law in an amount to be determined by the court in which such assistance was rendered. Immediately after such assistance is rendered and upon determination of the value thereon by the court, a statement of claim showing the name and residence of the recipient shall be filed for record where the recipient resides and in each county in which each recipient then owns or later acquires any property. Said liens shall be enforced on behalf of the state or county by the several public defenders and juvenile court defenders, and shall be utilized to reimburse the

state or county to defray the costs of the public and juvenile court system. The lien herein created shall be a continuing obligation, irrespective of any statute of limitations.

To recapitulate, there are several salient features about this suggested statute:

(1) An attempt is made to provide defenders only for felonies and for criminal offenses by juveniles. These are the only categories in which an indigent defendant is entitled to free counsel under existing Supreme Court decisions, and the only categories to which a pragmatic proposal can extend.

(2) In accord with the bill submitted to the 1968 legislature, a public defender is provided only for circuit court districts in which there is a city of the first or second class. Therefore, most counties will not be affected by the statute and will have only those defenders appointed by the court to serve without pay. It is a matter of money. How far will the legislature go at this time?

(3) An attempt is made to make the methods of election and compensation of the public defenders parallel to those of the commonwealth and county attorneys,<sup>62</sup> respectively. It is felt that this has a number of advantages over other systems of appointment<sup>63</sup> and compensation,<sup>64</sup> particularly over the 1968 bill's system of putting these matters in the judicial council.

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<sup>62</sup> There is an excellent discussion of the method of determining the compensation of the county attorney in Kentucky in the recent case of *Dennis v. Rich*, 434 S.W.2d 632 (Ky. 1968).

<sup>63</sup> U.S.C. § 3006A (1964).

<sup>64</sup> Not only did the 1968 legislature fail to pass an indigent defendant bill but the 1964 legislature failed to pass one providing for payment of assigned counsel according to the crime. See Matthews, *Payment of the Unfee'd Lawyer*, 28 Ky. St. B. J. 18 (1964).